


FW: ROGC Agenda Item C(3); File No. ROGC 22-506

Roche, Megan <megan.roche@sanjoseca.gov>

Wed 11/30/2022 8:51 AM

To: Rules and Open Government Committee Agendas <rulescommitteeagenda@sanjoseca.gov>

 1 attachments (4 MB)

Councilmember Esparza Proposal Response.pdf;

From: James Sutton <[REDACTED]>**Sent:** Wednesday, November 30, 2022 8:17 AM**To:** City Clerk <city.clerk@sanjoseca.gov>**Cc:** Frimann, Nora <Nora.Frimann@sanjoseca.gov>; District7 <District7@sanjoseca.gov>; Matthew Alvarez

<[REDACTED]>

Subject: ROGC Agenda Item C(3); File No. ROGC 22-506

[External Email]

Thank you for distributing this letter to members of the Rules & Open Government Committee before their meeting this afternoon.

James R. Sutton, Esq. | The Sutton Law Firm

[REDACTED] | [REDACTED]

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November 29, 2022

VIA EMAIL ONLY

Councilmember Maya Esparza
City of San Jose

RE: Rules & Open Government Committee Agenda Item C(3);
File No. ROGC 22-506

Dear Councilmember Esparza:

This letter responds to your November 21, 2022 Memorandum recommending that the City enact certain restrictions on political activities of former City officials and employees and political committees. Our client, the Common Good Silicon Valley PAC, asked us to submit this letter in order to clarify certain inaccurate statements in your Memorandum about the PAC, and to point out the legal problems with your proposals. We are also sending this letter to the City Clerk for distribution to the members of the Rules & Open Government Committee before their meeting on Wednesday, November 30, 2022, as well as to the City Attorney.

Most notably, your Memorandum implies that the Common Good Silicon Valley PAC is “controlled” by Mayor Liccardo. That is not true. The PAC is sponsored by Solutions Silicon Valley, a nonprofit organization focused on public education and grassroots advocacy. Although Mayor Liccardo helped the PAC raise funds during this election cycle,¹ the PAC is governed by the organization’s Board of Directors and its political activities were implemented by its consultants. Though the Memorandum mentions that the City’s Board of Fair Campaign and Political Practices dismissed a complaint against the PAC earlier this year, it does not clarify that the Board’s decision also effectively concluded that the PAC is not controlled by Mayor Liccardo.

¹Mayor Liccardo disclosed all of these fundraising activities on reports filed with the City Clerk.

Your Memorandum also states that the PAC accepted funds from “unknown donors” and did not timely disclose its contributions. That is also not true. All contributors to the PAC are listed on the reports which the PAC has filed with the City Clerk, and all of this information was available to the public before each election.

Your proposal to prohibit former City officials and employees from volunteering or working for “independent expenditure” committees is clearly unconstitutional. Volunteering and working on political campaigns are fundamental rights protected by the First Amendment, and the Supreme Court has confirmed on numerous occasions that the government may only restrict citizens’ political activities when the restrictions are absolutely necessary to promote important public policy reasons. (See, e.g., McCutcheon v. FEC (2014) 571 U.S. 191 [“There is no right more basic in our democracy than the right to participate in electing our political leaders.”].) Your Memorandum does not include any reasons why individuals who used to work for the City should not be able to volunteer or work for independent expenditure campaigns other than vague references to “the same conflicts of interest as activities like lobbying.”

The Supreme Court has also confirmed that any restrictions on citizens’ political activities must be narrowly tailored to meet the particular public policy concern. (See, e.g., Barker v. Wisc. Board of Ethics (1993) 841 F. Supp. 255 [invalidating ban on campaign volunteering by lobbyists].) Your Memorandum does not explain, however, why the City should restrict the First Amendment rights of former City officials and employees while allowing lobbyists, members of public employee unions and other special interests to work on independent expenditure campaigns. Finally, your reliance on “revolving door” laws to justify this proposal is misplaced because revolving door laws are aimed at potential undue influence by former City officials and employees over the government decision-making process, not at political campaigns. This proposal does not pass constitutional muster.

Your other proposal – limiting the size of contributions to ballot measure and independent expenditure committees which are “controlled” by a City candidate or elected official – also raises serious constitutional concerns. The Supreme Court has consistently held that ballot measures and independent expenditures garner the highest level of First Amendment protection and has struck down any attempt to limit contributions to these types of political committees. (Citizens Against Rent Control v. Berkeley (1981) 454 U.S. 290 & First National Bank v. Belotti (1978) 435 U.S. 765 [government may not limit contributions to ballot measures]; SpeechNow.org v. FEC (2010) 599 F.3d 686 & Long Beach Area Chamber

of Commerce v. Long Beach (2010) 603 F.3d 684 [government may not limit contributions to independent expenditure committees].²) In addition, in a case stemming from the independent expenditure activities of a political committee controlled by former San Jose Mayor Chuck Reed, a court upheld the rights of candidates and elected officials to control independent expenditure committees. (Reed v. FPPC (2014) Sacto. County Superior Court Case No. 34-2013-80001709.)

Although no court case has, to our knowledge, directly addressed the question of whether the government may limit contributions to a ballot measure or independent expenditure committee which is controlled by a candidate for public office,³ such a novel, new restriction would have to be based on concrete, empirical evidence that large contributions to ballot measure or independent expenditure committees “corrupt” candidates or “create the appearance” of corruption. (Citizens for Clean Govt. v. San Diego (2007) 474 F.3d 647 [“hypotheticals, accompanied by vague allusions to practical experience [do not] demonstrate a sufficiently important state interest”].) Your Memorandum does not offer any concrete evidence or specific examples that large contributions to candidate-controlled committees will affect the candidate’s stance on issues – and it in fact does not even reference any committees which are controlled by City candidates. This proposal is also riddled with constitutional issues.

We also want to point out that, even if your proposal to limit contributions to candidate-controlled committees were to be enacted and survive legal scrutiny, it would not have any impact on the Common Good Silicon Valley PAC. As mentioned above, the PAC is not controlled by a City candidate or elected official. In other words, though your proposal seems to be aimed squarely at stopping this particular PAC from raising and spending funds to support candidates for City office, it would not actually have that effect.

* * *

²A court in fact struck down San Jose’s attempt to limit contributions to independent expenditure committees supporting candidates for City office. (San Jose Silicon Valley Chamber of Commerce PAC v. San Jose (2009) Santa Clara County Superior Court Case No. 1-09 CV 146667.)

³Citizens to Save California v. FPPC (2006) 145 Cal.App.4th 736 invalidated the state’s attempt to limit contributions to candidate-controlled committees on procedural grounds.

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You indicate in your Memorandum that “Care should be given to ensure that this ordinance is consistent with all applicable state and federal laws.” (We would add that the City must also ensure that any proposed restriction on political activities is consistent with the First Amendment and with applicable state and federal court cases.) We therefore trust that you will review the legal principles and authorities outlined in this letter and not move forward with any proposed ordinance which would improperly restrict the First Amendment rights of former City officials, former City employees or political committees. We also request that you not make any further misrepresentations about the Common Good Silicon Valley PAC or its activities, and we would be happy to answer any questions you may have about the PAC.

Sincerely,



James R. Sutton

cc: City Attorney Nora Frimann
Rules & Open Government Committee Clerk
JRS/slf
#2294.01